MATERIALS FOR ENGLISH LEGAL HISTORY. II.

[Synopsis of preceding article: I. *England before the Norman Conquest.* (1) Dooms. (2) Diplomata. (3) Ecclesiastical Documents. II. *Norman Law.* (1) Exchequer Rolls. (2) Collections of Judgments. (3) Law Books. (4) Diplomata. III. *From the Norman Conquest to Glanvill and the Beginning of Legal Memory.* (1) Laws. (2) Private Collections of Laws and Legal Text-books. (3) Work upon Roman and Canon Law.]

(4) *The diplomata* of this period are numerous and of great interest; they are brief, formal documents, contrasting strongly with the lax and verbose land books of an earlier age; they are for the more part charters of feoffment and grants or confirmations of franchises; they have never been properly collected. Charters of liberties granted to towns should perhaps form a class by themselves, but those coming from this age are not numerous.[1]

(5) *Domesday Book, surveys, public accounts, etc.* By far the greatest monument of Norman government is Domesday Book, the record of the survey of England instituted by the Conqueror and effected by inquests of local jurors; it was completed in the summer of 1086.[2] The form of this document is generally

[1] Few aids would be more grateful to the historian of law or even to the historian of England than a "Codex Diplomaticus Normannici Aevi." As it is, the documents must be sought for in the Monasticon and the cartularies and annals of various religious houses. Some of these have been published in the Rolls series; those of Abingdon, Malmesbury, Gloucester, Ramsey and St. Albans (Mat. Par. Chron. Maj. vol. vi) may be mentioned. A useful selection for this and later times is given by Thomas Madox, Formulare Anglicanum (1702), with good remarks on matters diplomatic; another small selection of early charters has just been edited by J. Horace Round for the Pipe Roll society. Stubbs, Select Charters, gives the municipal charters of this time.

[2] Domesday, or the Exchequer Domesday, as it is sometimes called, was published by royal command in 1783 in two volumes; in 1811 a volume of indexes appeared; in 1816 the work was completed by a supplementary volume containing (*a*) the Exon Domesday, a survey of the south-western counties, the exact relation of which to the Exchequer Domesday is disputed, (*b*) the Inquisitio Eliensis, containing the returns relating to the possessions of the church of Ely, and two later documents, *viz.* (*c*) the Winton Domesday, a survey of Winchester in the time of Henry I, and (*d*) the

known; it is primarily a fiscal survey; the liability for "geld" in time past, the capacity for paying "geld" in time to come are the chief points which are to be ascertained; it has been well called "a great rate book." Incidentally, however, it gives us a marvellously detailed picture of the legal, social and economic state of England, but a picture which in some respects is not easily interpreted. Of late it has become the centre of a considerable literature;[1] but the historian of law will have to regret that a great deal of labor and ingenuity has been thrown away on the impossible attempt to solve the economic problems without first solving the legal problems.

The other public records of this period consist chiefly of Pipe Rolls, that is, the rolls of the sheriffs' accounts as audited by the Exchequer. Chance has preserved one very ancient roll, now ascribed to 31 Henry I. No other roll is found until 2 Henry II, but thenceforward the series is very continuous.[2] These rolls throw light directly on fiscal machinery and administration, indirectly on numberless points of law. The feudal arrangement of England, the distribution of knights' fees and serjeanties, the obligation of military service and so forth are illustrated by documents of Henry II's reign contained in the Black Book of the Exchequer.[3]

Boldon Book, a survey of the Palatinate of Durham in 1183. Since then (1861–63) the Exchequer Domesday has been "facsimiled" by photozincography; the part relating to each county can be bought separately. The Inquisitio Comitatus Cantabrigiensis, published by N. E. S. A. Hamilton in 1876, contains the returns made by the jurors of Cambridgeshire to the Domesday inquest.

[1] Among the works relating to Domesday may be mentioned the following: Henry Ellis, A General Introduction to Domesday Book (Rec. Com., 2 vols., 1833); Samuel Heywood, A Dissertation upon the Distinctions in Society and Ranks of the People under the Anglo-Saxon Governments (1818); James F. Morgan, England under the Norman Occupation (1858); several works of Robert William Eyton, A Key to Domesday [Dorset], Domesday Studies [Somerset] (2 vols., 1880), Domesday Studies [Stafford] (1881); appendixes to vol. v of Freeman's Norman Conquest; Domesday Studies (1888), a volume of essays by various writers edited by P. Edward Dove (a second volume of this work is promised).

[2] The Pipe Rolls of 31 Henry I, 2, 3, 4 Henry II, 1 Richard I and 3 John (this last from the Chancellor's antigraph) were edited for the Record commissioners by Joseph Hunter. The Pipe Roll society has now taken these documents in hand and published the rolls for 5–12 Henry II.

[3] The Liber Niger Scaccarii was edited by Thomas Hearne (2 vols., 1728).

(6) *Records of litigation.* Though we have evidence that before the end of Henry II's reign pleas before the king's court were enrolled, we have no extant plea rolls from this age. Accounts of litigation must be sought for in the monastic annals; when found they are too often loose statements of interested parties. However, a good many transcripts of procedural writs have been preserved and these are of the highest value. Before our period is out we begin to get a few "fines" (*i.e.* records of actions brought and compromised, already a common means of conveying land); in four cases the original documents are preserved, in other cases we have copies.[1]

In passing we should note that the chronicles of this age are fruitful fields. Not only do they sometimes contain documents of great importance, laws, ordinances, diplomata, but they also supply many illustrations of the working of law and from time to time give us contemporary criticism of legal measures and legal arrangements.

On the whole we have no reason to complain of the tools provided for us. We cannot say of England, as has been said of France and Germany, that between the period of the folk laws and the period of the law books lies a dark age which has left no legal monument of itself. In particular the *Leges Henrici* serve to mediate between the dooms of Canute and the treatise of Glanvill. The lack is rather of workmen than of implements. But it is to be remembered that it is only of late years that those implements have become generally accessible; also that we have had not only to learn but also to unlearn many things, for the whole of the traditional treatment of the legal history of the Norman time has been vitiated by the great Ingulfine forgery, one of the most splendidly successful frauds

[1] Melville Madison Bigelow, in his Placita Anglo-Normannica (London, 1879), has collected most of what has been discovered touching litigation between 1066 and 1189. For a newly found case, see F. Liebermann, Ungedruckte anglo-normannische Geschichtsquellen (Strassburg, 1879), pp. 251–256; for Norman cases of great value and their connection with English law, Brunner's Entstehung der Schwurgerichte (Berlin, 1871). As to early plea rolls and early fines, reference may be made to the Selden society's Select Pleas of the Crown, vol. 1 (1887), Introduction; since that introduction was written five more copies of fines of Henry II's day have been found in Camb. Univ. Libr. MS. Ee. iii, 60.

ever perpetrated. A great deal of what went on in the local courts we never shall know; but in Henry II's day the practice and procedure of the king's court become clear to us, and subsequent history has shown that the king's court, becoming in course of time the king's courts, was to have the whole fate of English law in its hands. Towards the end of the period the history of law begins to be, at least in part, a history of professional learning.

There is no very modern work devoted to the legal history of this age as a whole, but it is the subject of Georg Phillips' *Englische Reichs- und Rechtsgeschichte* (1827–28). M. M. Bigelow's *History of Procedure* (London, 1880) has provided for one important department. Of course constitutional history has had a large share of attention, and books have collected round Domesday and round two other points, namely, frankpledge and trial by jury. As to the former of these two points, it will only be necessary to mention Heinrich Marquardsen's *Haft und Bürgschaft bei den Angelsachsen* (Erlangen, 1852), as this will put its reader in the current of the discussion. As to the latter, Brunner's brilliant book, *Entstehung der Schwurgerichte*, has already been named; William Forsyth's *History of Trial by Jury* (1852), and Friedrich August Biener's *Das Englische Geschwornengericht* (Leipzig, 1852) are useful, though chiefly as regards a somewhat later time.

IV. *From the Coronation of Richard I to the Death of Edward I.*

Our sources of information now begin to flow very freely, and so much has already been printed that very probably the historian would find it easier to paint a life-like picture of the thirteenth century than to accomplish the same task for either the fourteenth or the fifteenth. We may arrange the materials under the following heads: (1) laws; (2) judicial records; (3) other public records; (4) law books; (5) law reports; (6) manorial law; (7) municipal and mercantile law.

(1) *Laws.* For reasons which will soon appear, we use the untechnical term "laws" rather than any more precise term. Neither Richard nor John was a legislator; they give us nothing

that can be called laws except a few ordinances touching weights, measures, money, the prices of victuals. At the end of his reign, however, John was forced to grant the Great Charter (1215); this, if it is a treaty between the various powers of the state, is also an act declaring and amending the law in a great number of particulars: to use terms familiar in our own day, *Magna Carta* is an act for the amendment of the law of real property and for the advancement of justice. The various editions (1215–16–17–25) of the charter being distinguished, we note that it is the charter of 1225 which becomes the *Magna Carta* of subsequent ages and which gets to be generally considered as the first "statute." The term "statute" is one that cannot easily be defined. It comes into use in Edward I's reign; supplanting "provisions," which is characteristic of Henry III's reign; which had supplanted "assize," characteristic of Henry II's, Richard's, John's. Our extant Statute Rolls begin with the statute of Gloucester (1278), and it is very doubtful whether before that date any rolls were set apart for the reception of laws. Some of the earlier laws of our period are to be found on other rolls, Patent, Close, *Coram Rege* Rolls: others are not to be found on any rolls at all, but have been preserved in monastic annals or other private manuscripts.[1]

[1] The laws must be sought primarily in editions of the Statute Book, in particular in the Statutes of the Realm, published for the Record commissioners, the first volume of which work (1810) contains the Charters of Liberties besides the earliest statutes. Stubbs' Select Charters is invaluable for this period, especially as giving the documents relating to the revolutionary time which preceded the Barons' War. Blackstone, The Great Charter (1759), is a learned and useful work. It should be remembered that the text of the earliest statutes is not in all respects very well fixed, *e.g.* it is possible to raise doubts as to the contents of the statute of Merton. There is yet room for work in this quarter. Also it should be noticed that editions of the statutes, including the commissioners' edition, contain Statuta Incerti Temporis. In lawyers' manuscripts these were found interpolated between the Statuta Vetera, which end with Edward II, and the Statuta Nova, which begin with Edward III, like the Apocrypha between the two Testaments; hence they came to be regarded as statutes of the last year of Edward II. Some of them are certainly older, and some of them were certainly never issued by any legislator, but are merely lawyers' notes; in the Year Books their statutory character is disputed; "apocryphal statutes" seems the best name for them. To make a critical edition of them would be a good deed. Perhaps the most interesting is the Prerogativa Regis, apparently some lawyer's notes about the king's prerogatives. Coke's Second Institute is the classical commentary on the early statutes.

In later times of course it became the settled doctrine that in a "statute" king, lords and commons must have concurred, and that a rule laid down with such concurrence is a "statute." But with our improved knowledge of the history of Parliament we cannot insist on this doctrine when dealing with the thirteenth century. Some of the received "statutes" even of Edward I's day, to say nothing of Henry III's, were issued without any participation by the commons in the legislative act. After the charter of 1225 we have the statute (or provisions) of Merton (1236), the provisions of Westminster (1259), the statute of Marlborough (1267), all of the first importance; and upon these follows the great series of Edward I's statutes, a most remarkable body of reforming laws. Hale's saying about Edward I was very true:

> I think I may safely say, all the ages since his time have not done so much in reference to the orderly settling and establishing of the distributive justice of this kingdom, as he did within a short compass of the thirty-five years of his reign; especially about the first thirteen years thereof.

(2) *Judicial records.* The extant Plea Rolls (rolls of pleadings and judgments) of the king's courts begin in 1194 (6 Richard I), and though we have by no means a complete series of them, we have for the thirteenth century far more than any one is likely to use. These rolls fall into divers classes; there are *Coram Rege* (King's Bench) Rolls, *De Banco* (Common Pleas) Rolls, Exchequer Rolls, Eyre Rolls, Assize Rolls, Gaol Delivery Rolls. The enormous value of these documents to the historian is obvious; they give him a very complete view of all the proceedings of the royal tribunals.[1] The rolls of the thirteenth

[1] We are still behindhand in the work of exploiting the Plea Rolls. In 1811 the Record commissioners published the Placitorum Abbreviatio, a collection of extracts and abstracts extending from Richard I to the death of Edward II, made by Arthur Agard and others in the reign of Elizabeth. Valuable as this book is, it can only be regarded as a stop-gap; our wants are not those of Elizabeth's day. In 1835 Palgrave edited for the commissioners a few of the rolls of Richard I and John under the title Rotuli Curiae Regis; the residue of Richard's rolls are to be published by the Pipe Roll society; the earliest rolls are not the most interesting. The present writer has edited Pleas of the Crown for the County of Gloucester (1884), the criminal part of an Eyre Roll of 1221; Bracton's Note Book (3 vols., 1887), near two thousand cases of Henry III's reign; and, for the Selden society, Select Pleas of the Crown

century are in one respect better material than those of later times, since they frequently give not merely the judgment but the *ratio decidendi* expressed in brief, neat terms. We also begin to get by the thousand "feet of fines," *i.e.* records of actions brought and compromised as a means of conveying land. The light which these hitherto neglected documents throw upon the history of conveyancing will some day be appreciated.[1]

(3) *Other public records.* The Pipe Rolls continue to give us the sheriffs' accounts; but their importance now becomes much less, since they are eclipsed by far more communicative rolls, namely, the Rolls of Letters Patent and Letters Close, the Fine Rolls and the Charter Rolls. These enable us to study in minute detail the whole of the administrative machinery of the realm; and, owing to the publication of those belonging to John's reign, the governmental work of that age can be very thoroughly understood and illustrated. The Charter Rolls contain copies of the royal grants made to municipalities and to individuals, and thus to some extent they supply the place of a *Codex Diplomaticus.* Then from Edward I's reign we have parliamentary records, a broken series of Rolls of Parliament, of Petitions to Parliament, and Pleas in Parliament.[2]

(4) *Law books.* In England as elsewhere the thirteenth

(vol. i, 1887), a selection of criminal cases from the period 1200–1225. In 1818 the Record commissioners published a large volume of Placita de Quo Warranto, mostly from Edward I's reign, which is full of precious information about feudal justice. But only a beginning has been made; in particular the very valuable Rolls of Exchequer Memoranda must be brought to light; their general character may be gathered from the few extracts printed at the beginning of Maynard's Year Book of Edward II (1678).

[1] Some of the fines of Richard's and John's reigns were edited for the commissioners by Joseph Hunter (2 vols., 1835–44); the residue are to be published by the Pipe Roll society. The fines of a little later date are far more valuable and show elaborate family settlements; but they are unprinted.

[2] Published for the Record commissioners are the Close Rolls, 1204–1224, edited by T. D. Hardy (2 vols., 1833–44); the Patent Rolls, 1201–1216, by Hardy, with a learned Introduction (1 vol., 1835); the Oblate and Fine Rolls of John's reign, by Hardy (1 vol., 1835); Excerpts from the Fine Rolls, 1216–1272, by Charles Roberts (2 vols., 1835–36); the Charter Rolls, 1199–1216, by Hardy (1 vol., 1837). The Rolls of Parliament (6 vols. and Index) were officially published in the last century, but at least so far as the first period (Edward I, II, III) is concerned, this edition leaves much to be desired. Many materials for the illustration of parliamentary business have since come to light, and vast numbers of early Petitions to Parliament still remain unprinted. Of the Hundred Rolls hereafter.

century might be called "the period of the law books"; that is to say, the historian of this period will naturally reckon text-books, notably one text-book, as among the very best of his materials.

(*a*) Bracton's *Tractatus* (or *Summa*) *de Legibus et Consuetudinibus Angliae* is by far the greatest of our mediæval law books. It seems to be the work of Henry of Bratton, who for many years was a judge of the king's court and who died in 1268. It seems also to be an unfinished book and to have been composed chiefly between the years 1250 and 1256. It covers the greater part of the field of law. In laying out his scheme the author has made great use of the works of Azo, a Bolognese civilian, and thence he has taken many of the generalities of law; he may also have made some study of the Roman books at first hand; but he was no mere theorist; at every point he appeals to the rolls of the king's court, especially to the rolls of two judges already dead, Martin of Pateshull and William of Raleigh; his law is English case law systematized by the aid of methods and principles which have been learnt from the civilians. A *Note Book* full of cases extracted from the rolls has recently been discovered, and there is some reason for thinking that it was made by or for Bracton and used by him in the composition of his treatise.[1]

(*b*) "Fleta" is the work of an anonymous author, seemingly compiled about 1290. It gets its name from a preface which

[1] An edition of Bracton was published in 1569 and reprinted in 1640; a new edition has been given in the Rolls series by Travers Twiss (6 vols, 1878–83); the editor however was hardly alive to the difficulty of his task and failed to observe that the very numerous MSS. present the work in several different stages of composition. A more adequate edition is much wanted. It should show what Bracton borrowed from Azo, and also, when this is important, what he declined to borrow from Azo; it should give all the cases cited by Bracton which are not already printed in the Note Book, or such of them as can yet be found on the rolls; it should settle the pedigree of the MSS., distinguish the author's original work from his afterthoughts and from the glosses by later hands, some of which glosses (never yet printed) are of great interest. Five years of hard work might give us a really good edition. The Note Book alluded to above was brought to light by Paul Vinogradoff in 1884 and has since been published (1887).

Bracton's relation to Azo is the subject of an excellent tract by Karl Güterbock, Henricus de Bracton und sein Verhältniss zum römischen Rechte (Berlin, 1862), translated by Brinton Coxe (Philadelphia, 1866).

says that this book may well be called Fleta since it was written "in Fleta," *i.e.* in the Fleet gaol. In substance it is an edition of Bracton much abridged and "brought up to date" by references to the earlier statutes of Edward I. It has however some things that are not in Bracton, notably an account of the manorial organization; this the writer seems to have obtained from what we may call "the Walter of Henley literature," to which reference will be made below.

(*c*) Bracton and Fleta are Latin books: "Britton" is our first French text-book. It seems to have been written about 1290. The writer made great use of Bracton and perhaps he used Fleta also; but he has better claim to be treated as an original author than has the maker of Fleta. He arranges Bracton's material according to a new plan, and puts his whole book into the king's mouth, so that all the law in it appears as the king's command. Who he was we do not know; he has been identified with John le Breton, a royal judge and bishop of Hereford; but the book, as we have it, mentions statutes passed after the bishop's death. To judge by the number of existing manuscripts, Bracton and Britton both became very popular, while Fleta had no success.[1]

(*d*) Selden had a manuscript purporting to contain Bracton's treatise abridged by Gilbert Thornton in the twentieth year of Edward I; Thornton was chief justice. Selden's manuscript is not forthcoming and he did not know of any other like it. Possibly, however, Thornton's abridgement is represented by some of the existing manuscripts which give abbreviated versions of Bracton's book.

(*e*) Works of minor importance are two little treatises on procedure by Ralph Hengham, known respectively as *Hengham Magna* and *Hengham Parva;* a small French tract of uncertain

[1] Fleta was printed in 1647 and again in 1685; these editions are faulty but are accompanied by a learned dissertation coming from Selden. Part of Fleta was edited anonymously by Sir Thomas Clark in 1735. An admirable edition of Britton has been published by Francis Morgan Nichols (2 vols. Oxford, 1865). Britton was first printed by Redman (without date) and was again printed in 1640; a translation of part of it was published in 1762 by Robert Kelham. Britton and Fleta are also to be found in Hδuard's Traités sur les Coutumes Anglo-Normandes.

date, also on procedure, known from its first words as *Fet assavoir;* and various little tracts found in manuscripts under such titles as *Summa ad cassandum omnimoda brevia, Summa quae vocatur Officium Justiciariorum, Summa quae vocatur Cadit Assisa, Placita placitata,* and the like. They are of an intensely practical character, but deserve to be collected.[1]

(*f*) To Edward II's reign, or perhaps to the end of his father's, we must attribute the interesting but dangerous *Mirror of Justices* of Andrew Horne, fishmonger and town clerk of London.[2] It is the work of one profoundly dissatisfied with the administration of the law by the king's judges. As against this he appeals to myths and legends about the law of King Alfred's day and the like, some of which myths and legends were perhaps traditional, while others may have been deliberately concocted. Intelligently read it is very instructive; but the intelligent reader will often infer that the law is exactly the opposite of what the writer represents it to be. It has done much harm to the cause of legal history; it imposed upon Coke and even in the present century has been treated as contemporary evidence of Anglo-Saxon law.

(*g*) There is hardly any book more urgently needed by the historian of English law than one which should trace the gradual growth of the body of original writs, *i.e.* of the writs whereby actions were begun; such writs were the very skeleton of our mediæval *corpus juris.* The official *Registrum Omnium Brevium* as printed in the sixteenth century (1531, 1553, 1595, 1687) is obviously a collection that has been slowly put together. It is believed that extant manuscripts still offer a large supply of materials capable of illustrating the process of its growth. Some of the manuscript collections of writs go back to Henry III's reign, and occasionally have notes naming the inventors of new writs.[3] Here is a field in which excellent work might be done.

[1] "Fet assavoir" appears at the end of the editions of Fleta. The two Henghams appear in Selden's edition of Fortescue's De Laudibus (1616). Some of the minor tracts seem never to have been printed.

[2] A poor version of the French text of the Mirror was issued in 1642 an English translation of it by William Hughes in 1642, 1768 and 1840. A critical edition of this curious book would be of great value.

[3] Thus a Cambridge MS. Kk, v, 33, gives a very early Registrum Brevium in which

(5) *Law reports.* Just at the end of the thirteenth century there appear books of a new kind, books whose successors are to play a very large part in the legal history of all subsequent ages; we have a few Year Books of Edward I's reign.[1] These are reports in French by anonymous writers of the discussions which took place in court between judges and counsel over cases of interest; whether they bore any official sanction we do not know. They are of special value as showing the development of legal conceptions, which is better displayed in the dialectic process than in the formal Latin record which gives the pleadings and judgment in their final form; we learn what arguments were used and also what arguments had to be abandoned. But for the period now in question we can only give the Year Books a secondary place among our materials.

(6) *Manorial law.* Of late years our horizon has been enormously extended by the revelation of vast quantities of documents illustrative of manorial law and custom, a department of law which has hitherto been much neglected, but which is of the very highest interest to all students of economic and social history.

(*a*) In the first place we have numerous "extents" of manors, *i.e.* descriptions which give us the number and names of the tenants, the size of their holdings, the legal character of their tenure and the kind and amount of their service; the "extent" is a statement of all these things made by a jury of tenants. Such extents are found in the monastic cartularies and registers. Among these we may mention the Boldon Book, which is an account of the palatinate of Durham, the Glastonbury Inquisitions, the Cartulary of Burton Abbey, the Domesday of St.

we may read how a number of writs were invented by William Raleigh. The earliest Register known to me is in Mus. Brit. MS. Cotton. Julius D. II.

[1] Happily the Year Books of Edward I remained unprinted until very lately; the consequence is that we have a good edition of them. Between 1863 and 1879 Alfred J. Horwood edited for the Rolls series five volumes containing cases from the years 20, 21, 22, 30, 31, 32, 33, 35 Edw. I. Before his death he had begun work on the Year Books of a later age, and the inference might be drawn that he was unable to find any more reports of Edward I's reign. But he seems to have nowhere stated that this was so, and a cursory inspection of the manuscripts induces the belief that they have not yet been exhausted.

Paul's, the Register of Worcester Priory, the Cartularies of Gloucester, Ramsey, and Battle. A few of those mentioned at the head of our list take us back into the twelfth century. There are still several cartularies which ought to be printed. The "Hundred Rolls" compiled in Edward I's reign give us the results of a great inquest prosecuted by royal authority into "the franchises," *i.e.* the jurisdictional and other regalia which were in the hands of subjects; we thus obtain an excellent picture of seignorial justice. But for certain counties and parts of counties these Hundred Rolls give us far more, namely, full "extents" of all manors. They thus serve to supplement and correct the notions which we might form if we studied only the ecclesiastical manors as displayed in the cartularies.[1]

(*b*) Almost nothing has yet been done towards the publication of a class of documents which are quite as important as the "extents," namely, the earliest rolls of the manorial and other local courts. We have a few older than 1250, a considerable number older than 1300.[2] They show the manorial system in full play, illustrate all its workings and throw light on many points of legal history which are not explained by the records of more exalted courts.[3]

[1] The Boldon Book was published as an appendix to the official edition of Domesday, vol. iv, and again by the Surtees society; the Glastonbury Inquisitions were printed for the Roxburghe club; an abstract of the Burton Cartulary for the Salt society; the Black Book of Peterborough for the Camden society at the end of the Chronicon Petroburgense; the Domesday of St. Paul's and the Worcester Register (both with valuable introductions by William Hale Hale) and the Battle Cartulary for the Camden society; the Gloucester and Ramsey Cartularies are in the Rolls series. The Hundred Rolls were published by the Record commissioners (2 vols., 1812–18). The publications of the Camden society are often in the market.

[2] The Selden society's volume for 1888, Select Pleas in Manorial and other Seignorial Courts, gives extracts from some typical rolls of the thirteenth century and may serve to stimulate a desire for further information.

[3] There are several little treatises on the practice of manorial courts. Some of these in their final shape belong to the next period and are represented by the Modus tenendi Curiam Baronis, two editions by R. Pynson (n.d. — 1516–20?); Modus tenendi unum Hundredum, Redman (1539); Modus tenendi Curiam Baronis, Berthelet (1544); The Maner of kepynge a Courte Baron, Elisabeth Pykeringe (1542?); The Maner of kepynge a Court Baron, Robert Toye (1546). But beside these there is a quite early set of precedents which seems never to have been printed. It generally begins "Ici poet home trover suffysaument . . . tut le cours de court de baron." It is found in several MSS., *e.g.* Mus. Brit. Egerton, 656; Add. 5762; Lands, 467.

(*c*) Little known to the world, there is a small but complicated literature of tracts on "husbandry" and the management of manors. In whole or in part it is often associated with the name of a certain "Walter of Henley." The author of Fleta has made use of it in his well-known chapter on the manorial system. Further investigation will perhaps distinguish between two or three tracts that are intertwined in the manuscripts and presented in varying forms. An edition of all or some of these tracts has been projected. They bear directly rather on agricultural and economic than on legal history; but the historian of manorial law cannot afford to neglect them.[1]

This department of mediæval law, concerning as it does the great mass of the population, is beginning to attract the attention that it deserves. The traditional learning of lawyers about the manorial system went back only to comparatively recent times and their speculations about earlier ages had been meagre and fruitless. A new vista was opened by Erwin Nasse's *Ueber die mittelalterliche Feldgemeinschaft in England* (Bonn, 1869), which was translated into English by H. A. Ouvry (1871). H. S. Maine's *Lectures on Village Communities in the East and West* (1876) drew the attention of Englishmen to the work that had been done in Germany. Frederic Seebohm's *English Village Community* (1883) came into sharp conflict with what were coming to be accepted doctrines and must lead to yet further researches. In 1887 Paul Vinogradoff published at St. Petersburg a Russian treatise in which much use was made of our manorial extents and rolls; a larger work in English by

[1] One of these tracts (in an English version) got printed very early without date or printer's name. "Boke of husbandry. Here begy*n*neth a treatyse of husbandry whiche mayster Groshede so*m*tyme byssshop of Lyncoln made and translated it out of Frensshe into Englysshe . . . The 1. chapitre. The fader in his olde age sayth to his sone lyve wysely. . . . Here endeth the boke of husbandry and of plantynge and graffynge of trees and vines." One of the tracts was published by Louis Lacour; Traité inédit d'économie rurale composé en Angleterre, Paris, 1856. These seem at present the only printed representatives of this "Walter of Henley literature"; but it appears in many manuscripts. For information on this subject I am indebted to my friend Dr. William Cunningham, the author of The Growth of English Industry and Commerce, who proposes, I believe, to reprint in the second edition of his book the rare tract ascribed to Bishop Grostete of Lincoln. Some other of these tracts are, I hear, to be edited for the Royal Historical society.

the same hand is expected. This of course is a department in which legal and economic history meet; and it has become clear that the historian of law must realize the economic meaning of legal rules while the historical school of economists must study mediæval law.

(7) *Municipal and mercantile law.* The growth of municipal institutions, the development of guilds and corporations, are now recognized topics of "constitutional history." But a great deal remains to be done towards the publication of documents illustrating the laws and customs administered in the municipal courts. In particular there is much to be discovered about "the law merchant." Before the end of the thirteenth century the idea had been formed of a *lex mercatoria*, to be administered between merchants in mercantile affairs, which differed in some respects from the common law. Throughout the middle ages the merchants had special tribunals to go to, and consequently very few of their affairs are noticed in the Year Books. Whether very much of this law merchant can be recovered may be doubtful, but until the archives of our cities and boroughs have been thoroughly explored by some one who knows what to look for, we shall do well to believe that something may yet be learned.[1]

V. *From Edward III to Henry VIII.*

About the remainder of the middle ages we must speak more briefly. On the whole the law has no longer to be sought in out of the way or but newly accessible sources; it may be found in books which lawyers have long had by them and regarded not merely as evidence of old law but as authority, namely the

[1] Thomas Madox's Firma Burgi (1726) is a vast mine of facts, and many will be found in The History of Boroughs, by Henry Alworth Mereweather and Archibald John Stephens (3 vols., 1835). For London, Henry Thomas Riley's Monumenta Gildhallae Londoniensis (Rolls series, 3 vols. in 4, 1859–62) is the great book. A custumal of Ipswich is printed by Travers Twiss in vol. ii of the Black Book of the Admiralty (Rolls series, 1873). A considerable number of other municipal custumals belonging to this and the next period are known to exist in manuscript. A little about the law merchant will be found in the Selden society's vol. ii, where some pleas in the court of the Fair of St. Ives are given. A great deal about the legal treatment of merchants and mercantile affairs is collected by Georg Schanz, Englische Handelspolitik (2 vols., Leipzig, 1881).

Statute Book, the Year Books and the very few text-books which this age presents. It would be a great mistake, however, to suppose that these sources should be exclusively used or that they are in the state in which they ought to be.

After Edward the Third's accession we can insist on a strict definition of a statute. The more important laws of a general character are placed on the Statute Roll and about their text there can seldom be any dispute; we have a good official edition of them. But the Parliament Rolls, an unfortunately broken series, also should be studied, as they often show the motives of the legislators and also contain some of those acts of Parliament which were not thought of sufficient general and permanent importance to be engrossed on the Statute Roll; a great deal that concerns trade and agriculture and villainage and the working of the inferior organs of the constitution, in particular the new magistracy, the justices of the peace, must be sought rather in the Parliament Rolls than among the collections of statutes. Again, most of the other series of non-judicial rolls mentioned above are continued; and though they are not of such priceless value for this as for former periods, they should certainly not be neglected by any one who wishes to make real to himself and others the working of our public law. A great deal of that law never comes into the pages of the Year Books and for that reason has remained unknown to us.

We turn to the law reports. A series of Year Books extends from Edward II to Henry VIII, from 1307 to 1535. They got into print piecemeal at various times; the most comprehensive edition is one published in ten volumes, 1678-80. This edition has about as many faults as an edition can well have; it teems with gross and perplexing blunders. Happily it is not complete, and we have thus been enabled to contrast a good with a bad edition. It leaves a gap between the tenth and the seventeenth years of Edward III. This gap is being gradually filled up in the Rolls series by L. O. Pike, who has already given the books for the years 11–14 Edward III; but there are several other considerable gaps to be filled, one for instance between the thirtieth and thirty-eighth years of the same reign, another repre-

senting the whole reign of Richard II. Henry VIII's long reign is scurvily treated, and though we begin now to get a little help from reporters whose names are known, from Dyer and others, still it is true that we have singularly few printed memorials of the law of this important time. An edition of all the Year Books similar to that which we now have in the Rolls series for a few lucky years of Edward III would be an inestimable gain, not merely to the historian of law but to the historian of the English people.

One of the many excellent features of these newly published Year Books of Edward III's reign consists of further information about the cases there reported, which information has been obtained from the Plea Rolls. Often the report of a case in the Year Books is but partially intelligible to modern readers until they are told what are the pleadings and the judgment formally recorded on the official roll of the court. The Plea Rolls are extant. To print even a few rolls of the fourteenth or fifteenth century would be a heavy task, so copious is the flow of litigation, so lengthy have the pleadings by this time become.[1] Still, in that new edition of the Year Books which is urgently needed, a brief statement of the recorded pleadings and judgment ought to be frequently given. But this is not the only use that should be made of the rolls. The Year Books, invaluable though they be (or would be were they made legible), are far from giving us a complete view even of the litigation of the period, to say nothing of a complete view of its law. They are essentially books made by lawyers for lawyers, and consequently they put prominently before us only those parts of the law which were of immediate interest to the practitioners of the time; an exaggerated emphasis is thus laid on minute points of pleading and practice, while some of the weightiest matters of the law are treated as obvious and therefore fall into the background. If anything like a thorough history of "the forms of action" is to be written, the Plea Rolls as well as the Year Books must be examined. The work of turning over roll after roll will be long

[1] It is said that the rolls of the Court of Common Pleas for Henry VIII's reign consist of 102,566 skins of parchment.

and tedious, but greater feats of industry have been performed with far less gain in prospect. To give one example of the use of the Plea Rolls, let us recall Darnel's Case, the famous case of Charles I's day, about the power of the king and the lords of the council to commit to prison. The question what were the courts to do with a man so committed could not be answered out of the Year Books, it had to be answered out of the Plea Rolls. These rolls contain an exhaustive history of the writ of *habeas corpus*, the Year Books have little about it, for cases about "misnomer" and the like had been far more interesting to lawyers than "the liberty of the subject." And so it is to be suspected that the new principles of private law which appear in the Year Books of Edward IV — the rise of the action of assumpsit, the doctrine of consideration, the protection of copyholders, the conversion of the action of ejectment into a means of trying title to lands, the destruction of estates tail by fictitious recoveries — that all these and many other matters of elementary importance might be fully illustrated from the Plea Rolls, whereas the Year Books give us but dark hints and unsolved riddles.

The manor becomes steadily of less importance during this period; but that is no reason why the manorial rolls, of which we have now an ample supply, should be neglected; but neglected they have hitherto been. The historian should take account not only of growth but of decay also, and the records of this time should give the most welcome evidence as to the effect of great social catastrophes, the black death, the peasants' revolt, the dissolution of the monasteries, and also as to the formation of what comes to be known as copyhold tenure. And again, turning from country to town, we shall not believe that the development of the law merchant has left no traces of itself until some one has given a few years to hunting for them.

Still more important, at least more exciting, is the history of the jurisdiction of the Council and of the new courts which arise out of it, the Court of Star Chamber, the Court of Chancery. Much has been recovered, but assuredly much more can be recovered. There are large quantities of Chancery proceedings to

be examined; and it is impossible to believe that we shall always be left in our present state of utter ignorance as to the sources of that equitable jurisprudence which in course of time transfigured our English law, be left guessing whether the chancellors trusted to natural reason, or borrowed from Roman law, or merely developed principles of old English law which had got shut out from the courts of common law by the rigors of the system of writs.[1]

With a few, and these late exceptions, the text-books of the time are of little value; with the thirteenth century died the impulse to explain the law as a reasonable system and give it an artistic shape. Still that is no reason why such books as there are should be left in their present dateless, ill-printed or even unprinted condition; the *Old Tenures*, the *Old Natura Brevium*, the *Novae Narrationes* want editors; and towards the end of our period we get some "readings" which should be published, such as Marrow's *Reading on Justices of the Peace*, a work which Fitzherbert and Lambard treated as of high authority. Littleton's *Tenures*, which marks the revival of legal and literary endeavor under Edward IV, has had enough done for it by its great commentator, in some respects more than enough, for the historian will have to warn himself against seeing Coke in Littleton.[2] Needless to say it is a very good book; and the

[1] The Proceedings and Ordinances of the Privy Council from 1386 to 1542 were edited for the Record commissioners by Nicholas Harris Nicolas (7 vols., 1834–37). There are two well-known monographs, Francis Palgrave, Essay upon the Original Authority of the King's Council (1834) and A. V. Dicey, Essay on the Privy Council (2d ed., 1887). The Calendars of the Proceedings in Chancery in the Reign of Elizabeth, as published by the commissioners (3 vols., 1827–32), contain some specimens of earlier proceedings beginning in the reign of Richard II. A calendar of proceedings in Chancery beginning with Richard's reign is in the press. Spence's Equitable Jurisdiction, mentioned above, affords much that is of historical value. But quite new ground was broken by L. O. Pike's essay on Common Law and Conscience in the Ancient Court of Chancery, *Law Quarterly Review*, I, 443, and by O. W. Holmes' daring paper on Early English Equity, *ibid.* 162. The suggestions thus made must be followed up; and it is believed that the materials for a history of the beginnings of equity are to be found at the Record office in great abundance. It is high time that they should be used. As to the Star Chamber, considering how important, how picturesque a part it played in English history, it is surprising that no very serious attempt should have been made to master the great mass of documents relating to it.

[2] Early editions of Littleton's Tenures are numerous and some of them are precious;

last parts of it, now little read, are a most curious monument of the dying middle ages. They only become really intelligible and lifelike in the light of the Paston Letters and similar evidence, a light which reveals the marvellous environment of violence, fraud and chicane in which an English gentleman lived. Under Henry VIII, Fitzherbert begins the work of summing up our mediæval law in his *Abridgement* and his *New Natura Brevium*. Sir John Fortescue's works give excellent illustrations of several legal institutions, notably of trial by jury, though as a whole they are rather concerned with politics than with law.[1]

Here I must stop, without of course intending to suggest that history stops here. The historian of modern law — the historian, let us say, who should choose as his starting point the reign of Elizabeth — would have before him an enormously difficult task. The difficulty would lie not in a dearth but in a superabundance of materials. To trace the development of the leading doctrines at once faithfully and artistically would require not only vast learning but consummate skill, such a combination of powers as is allowed to but few men in a century. But the result might be one of the most instructive and most readable books ever written, one of the great books of the world. However, no one who feels the impulse to undertake such a work will need to be told how to set about it or whither to look for his materials. It is somewhat otherwise as regards the middle ages; those who have seen a little of our records printed and unprinted may be able to give a few acceptable hints to those who have seen less, and it is with some vague hope that the above notes may be of service to

an edition by T. E. Tomlins, 1841, is probably the best. Any one who has heard of Coke upon Littleton has probably also heard of the fine edition of that book made by Francis Hargrave and Charles Butler; their notes, especially Butler's, are of real value even for the mediæval period. The Novae Narrationes were printed by Pynson without date and were published again in 1561; both the Old Tenures and the Old Natura Brevium were printed by Pynson.

[1] Fortescue's most famous work De Laudibus Legum Angliae was edited with important notes by Selden in 1616, and has since been edited by A. Amos. His writings will be found in the first volume of a luxurious book printed for private circulation by Lord Clermont, Sir John Fortescue and his Descendants. His tract on The Governance of England has been beautifully edited with an elaborate apparatus by Charles Plummer (1885).

beginners that they have been strung together; may they soon become antiquated, even if they are not so already! They should at least convey the impression that there is a great deal to be done for English mediæval law; much of it can only be done in England, for we have got the documents here; but there is no reason why it should not be done by Americans. We have piles, stacks, cartloads of documents waiting to be read — will some one come over into England and help us?[1]

F. W. MAITLAND.

[1] As I have reason to believe that the difficulty of reading legal MSS. is greatly exaggerated by those who have made no experiment, I may be allowed to say that any one who knows some law and some Latin will find that the difficulty disappears in a few weeks. Of course I am not denying that from time to time problems may arise which only an experienced or perhaps a specially gifted eye can solve, but as a general rule our legal records from the beginning of the thirteenth century downwards are written with mechanical regularity; during the thirteenth century the writing is often beautiful; usually if one cannot read them this is because one does not know law enough, not because the characters are ill-formed or obscure.